

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 17 March 2003

Case No. 2002-AIR-7

JAMES A. STONEKING,
Complainant,

v.

AVBASE AVIATION, LLC,
Respondent.

APPEARANCES:

JOEL I. NEWMAN, ESQ.
711 Leader Building
526 Superior Avenue
Cleveland, Ohio 44114
For the Complainant

GREGORY M. LICHKO, ESQ.
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Cleveland, Ohio 44115-2001
For the Respondent

Before: THOMAS F. PHALEN, JR.
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21 Act"), 49 U.S.C. Section 42121. The regulations that govern this matter appear at 29 C.F.R. Parts 18, and 1979. Such provisions protect employees from discrimination for attempting to carry out the purposes of the AIR21 Act, that was specifically adopted to provide employee protection from discrimination by air carriers because the employee has engaged in protected activity pertaining to a violation of an order or regulation of the Federal Aviation Administration, or any provision of Federal Law relating to air safety.

On October 31, 2001, Mr. Stoneking filed a complaint of discrimination under Section 42121 of the Act. The complaint was investigated and, on December 27, 2001 was found not to have merit. (ALJX 5)¹ In the investigation stage, the complainant in an aviation whistleblower case faces the initial burden of proof to make a *prima facie* showing that (1) the complainant engaged in protected activity; (2) the complainant was subjected to adverse action; and (3) the evidence is sufficient to raise a reasonable inference that the protected activity was the likely reason for the adverse action. 49 U.S.C. § 42121(b)(2)(B)(i); 29 C.F.R. § 1979.104(b)(1-2). This burden was not attained in the investigation phase. The complaint was dismissed, and Complainant appealed the dismissal.

A timely request for a formal hearing in this case was filed by the Complainant on January 8, 2002. (ALJX 6) Pursuant to an order of the undersigned dated February 28, 2002, (ALJX 1) the hearing in this case was held on May 29, 2002. When the complainant reaches the hearing stage, it is heard de novo, as a completely new matter. Here, the complainant must demonstrate, by a preponderance of the evidence, that he engaged in protected activity which was a contributing factor in the employer's alleged unfavorable personnel decision. 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a); *see also Trimmer v. United States Department of Labor*, 174 F.3d 1098, 1101-02 (10th Cir. 1999)(discussing distinct analytical burden-shifting model employed under 42 U.S.C. § 5851 (1992) to avoid frivolous complaints, and rejecting the burden-shifting established by *McDonnell Douglas Corp v. Green*, 411 U.S. 792, 800-05 (1973)). The burden then shifts to the employer, only after complainant meets his burden, to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior. 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a). The continuing obligations on both are for the complainant to establish the alleged violations by a preponderance of the evidence, and for the employer to establish that it would have taken the same action notwithstanding its behavior relative to the protected activity.

The parties in this hearing were represented by counsel. They were given an opportunity to present evidence and arguments, and to file briefs in the matter. Briefs and reply briefs were filed by the parties. Complainant's brief was filed after the filing date *instantly*, without objection of the Respondent. After considering all of the documentary and testimonial evidence, and the arguments and briefs of the parties, I find that Complainant has not established by a preponderance of the evidence that his protected activity contributed to any adverse action that may have been imposed by his employer in the acceptance of his resignation for the reasons set forth herein.

¹References to the exhibits of the Administrative Law Judge, and the Joint, Complainant and Respondent exhibits, and to the official transcript will be designated, "ALJX", "JX", "CX", "RX" and "T" with the exhibit or page number following the designation.

ISSUES

1. Whether respondent committed adverse action against complainant in response to protected activity under the AIR21 Act.
2. What damages and remedies, if any, the complainant is entitled to as a result of the actions taken by respondent.

UNCONTESTED FINDINGS

While formal stipulations were not submitted by the parties, I find that objections to the following basic conclusions have not been made, and that they have been established as a matter of fact and law:

1. The Office of Administrative Law Judges, U.S. Department of Labor, has jurisdiction over the parties in the subject matter of this action.
2. Respondent is an “air carrier” engaged in interstate commerce and an “employer” and/or “person” subject to the provisions of Section 42121 of the AIR21 Act. (See 29 C.F.R. Section 1979.101.)²
3. Complainant is now and at all times material a person and an “employee” as defined in 29 C.F.R. Section 1979.101.
4. Pursuant to the provisions of the AIR21 Act, on October 31, 2001, Complainant filed a timely complaint of discrimination with the Secretary of Labor, alleging that Respondent discriminated against him in violation of Section 42121(b)(1) of the AIR21 Act.
6. Following an investigation, on December 20, 2001 the Area Director, Occupational Safety and Health Administration issued findings that the complaint was without merit, in that there was no reasonable cause to believe that Respondent had discriminated against Complainant in violation of the AIR21 Act. (ALJX’s 3 & 4)
7. On December 30, 2001, the Complainant timely mailed an appeal and request for hearing to the Chief, Administrative Law Judge, U.S. Department of Labor, Washington, D.C., which was docketed on January 8, 2002. (ALJX 6)

²In its motion for summary judgment (ALJX 9), which was adopted in Respondent’s pre-trial statement, Respondent stated: Abase is an aircraft management and services company which operates from its headquarters in Cleveland, Ohio.” (ALJX 9, p.2, and Attachment “A”, Affidavit of Abase President, John DePalma, p. 1, supervisor of Complainant Pilot Stoneking.)

8. The appeal of the Complainant satisfied the 30-day time constraints as provided by 49 CFR Section 42121(b)(2)(A) .

FINDINGS OF FACT

Background:

Unless otherwise noted the following constitute findings of fact on the record as a whole:

Complainant, James M. Stoneking, (“Mr. Stoneking”), has been a professional pilot, who was employed at the time of the hearing at Gulfstream Aerospace. He was formerly employed by the Respondent, AvBase Aviation (“AvBase”), originally as a Line Captain, then as Chief Pilot, and as Check Airman appointed by both AvBase President, John DePalma, and the Federal Aviation Administration (“FAA”). Starting on July 17, 2000, he had been assigned as Line Captain to the Citation Three, as Pilot-in-Command under Part 135 of the FAA Regulations.

As Chief Pilot since March 1, 2001, until he resigned that position before August 18, 2001 for other reasons, (JTX 2, Addendum) Mr. Stoneking performed a number of duties, including responsibility for the ongoing operations, making sure FAA regulations were adhered to by the subordinate captains and first officers assigned to aircraft; working as a liaison with the company to make sure that staffing and aircraft utilization was maximized, and doing whatever was necessary to do business. In his capacity as FAA Check Airman, he was assigned by the FAA “as the eyes and ears for the FAA,” making sure that the company operated in compliance with the pertinent 135 Chapter Regulations. He also did check rides, to make sure that the pilots were current and proficient, and up to the standards required by AvBase and the FAA.³

In August of 2001, Mr. Stoneking’s base salary was \$65,000.00, with additional flight pay above 35 hours at the rate of \$150.00 per flight hour, plus \$12.00 per flight hour for per diem and incidental road expenses. He averaged 14 hours a month overtime, and would have been paid that for August, 2001, but was not.⁴

³Mr. Stoneking’s position as Chief Pilot ended when Stoneking first sent in a letter of resignation from that position to Mr. DePalma, around June 1st, which is not in the record. Mr. DePalma would not accept it because, he said, he did not need to raise any red flags with the FAA, so he would accept it, effective July 31st. However, while he had no authorization or ability to act as Chief Pilot, whatsoever, from June 1st until July 31st, the resignation was effective August 31st to avoid unspecified problems with the FAA. On August 31st, the title would disappear, and he was, then, just a line captain, and his additional pay for Chief Pilot was discontinued. (Despite unexplained inconsistencies in these dates, they do not affect the results of this decision and order.)

⁴\$150.00 times 14 hours would have been \$2,100.00 - plus one month’s salary would have been \$5,600.00, or \$7,700.00, total back pay for August, 2001.

The Resignation Letter and Addendum:

Mr. Stoneking testified that on August 18, 2001, he sent a resignation letter to Mr. DePalma via e-mail, (JX 1) using his laptop computer, and that he sent both the original resignation letter (JX 1) and an attachment directly to Mr. DePalma with the cover letter. (See the 4 Page Attachment to JX 2, which Mr. Stoneking also referred to as the “Addendum”, and which is attached to this Decision and Order as Appendix “A”.⁵) His intent was to give the required two-week notice and submit a written date for his separation at a later date. In the addendum, he wanted Mr. DePalma to understand how he felt on issues that needed to be addressed to curtail additional turnover within the company. He called it a “heads-up” that he would not be staying, and was giving it this way because there had been six or seven others leave without notice to AvBase, leaving it without the ability to recruit before they left.

While nothing was said about any FAA regulation violations in the August 18th letter, Mr. Stoneking maintained that those references were in the addendum. He insisted that both the letter and the addendum were typed at the same time; that they were still stored in his laptop, and that the addendum was transmitted at the same time as his letter. He agreed, however, that none of the items listed in the addendum were discussed in an August 25th meeting held regarding the August 18th letter.

Mr. DePalma denied receipt of the e-mailed addendum until the hard copies were received via certified mail on August 27th.

Mr. Stoneking testified that he felt Mr. DePalma had the details of the addendum at the August 25th meeting, and the fact that they were not discussed at that meeting did not strike Mr. Stoneking as one of concern due to the nature of their relationship: best of friends at times; butting heads at others. He felt that the nature of the meeting was to step back and to try to resolve issues, which he felt was being done.

I stated at the hearing : “I have no substantial evidence that the company was in possession of the second August 18, 2001 document”, (the addendum to the August 18th letter) at the time of the August 25, 2001 meeting, (T 62) and I so find. Further questioning of Mr. Stoneking by Respondent’s counsel verifies this conclusion. I now conclude that Mr. Stoneking’s statement is that he only e-mailed the original and the attached addendum letters once, at the same time; and that he only mailed the hard copies of both once, at the same time. He did not confirm that the addendum was actually transmitted in the e-mail. There being no physical evidence that the addendum was received with the original e-mailed resignation letter of

⁵Due to its overall tone, and as otherwise referred to herein, the full text of the JX 2 Attachment, also called the “addendum” dated August 18, 2001 from Mr. Stoneking to Mr. DePalma is attached to this decision and order as Appendix A.

August 18, 2001, I credit Mr. DePalma's testimony on this point, and find that there is insufficient evidence to conclude that if the addendum was received or in the possession of Mr. DePalma at that time or the time of the August 25th meeting.

Mr. Stoneking's first inclination that the certified mail containing the addendum had been received was on August 24, 2001 when his wife got hold of him and told him that AvBase had withheld his paycheck. On querying the matter via e-mail to AvBase, he learned that the paycheck was being held in Cleveland due to the resignation letter, and that he would have to go to Cleveland to collect it. I find that this was an erroneous assumption on Mr. Stoneking's part, and that the certified mail copy of the August 18th letter with the addendum was not received by Respondent until August 27, 2001.

When he landed in Tulsa, Oklahoma on August 24th with passengers on board, police met Mr. Stoneking at the aircraft. An officer informed him that Mr. DePalma felt that it was not in his best interest for Mr. Stoneking to fly his aircraft and that he was to be "evicted off the aircraft at that time." (T 47) He was then escorted from the plane by the officer; met with an Executive Jet Official, Martin Placky, and talked by phone with DePalma. Both Placky and DePalma verified what he had been told by the officer, and that it had been determined that they needed to let tempers calm down a little bit. They told him to get a good night's sleep, and to bring the aircraft back to Cleveland for a scheduled 900-hour maintenance inspection at Cleveland.

The August 25th Meeting:

The next morning, on August 25, 2001, Mr. Stoneking flew the aircraft back to Cleveland. On arrival, he turned-in his paperwork, and saw Mr. DePalma and Mike Driller waiting for him in the hall. They went to Jim Clifford's office. DePalma apologized several times for the "eviction" from the aircraft; said that it was not the right thing to do, and asked if Mr. Stoneking would accept his apology. Stoneking said that he told them that he had done whatever he could to help with the turnover they had from the standpoint of being a good employee for DePalma and that personally, he liked DePalma. He had previously attended dinners with DePalma and Cheryl, (apparently his wife) and stated that he wanted to think that they could continue their relationship. However, he felt that he just did not know what they wanted from him. They suggested that he just calm down; that they would look at it for another thirty days, and that they would then review what was going on.

Mr. DePalma testified that as a result of the August 25th meeting, he felt they had accepted Mr. Stoneking's resignation, and that the thirty days was to continue his employment so that he could be replaced. From the conversation as recalled by Mr. Stoneking, it appeared that the subject of obtaining a replacement for him had been dropped in the August 25th meeting, since an apparent resolution had been reached. He recalled being conscious of a general

discussion about AvBase not wanting to be left without a crew member at all on that aircraft as they had in the past, but that with the thirty days, they could continue from there, and if it didn't work out they would still have time to find somebody. The fact is that they had an agreement: they agreed to keep him on for thirty days; his performance would be reviewed at the end of the period by Mr. Driller, and Mr. DePalma, being, "the eternal optimist" as he testified, characterized his feelings about the matter as being that in that time "things could change."

I credit Mr. Stoneking's understanding, at that time, from both DePalma and Driller, that they would give him an additional thirty days of employment with a review at the end of it by Driller, and that this was all that was discussed. As was stated above, I conclude that the "litany" of items listed in the addendum were not discussed, even though Stoneking thought that a "pile" of correspondence and documents that Mr. Driller had with him might have contained the addendum to the original August 18th letter. In fact, he admitted that he did not know that to be the case. DePalma and Driller both verified the content of this discussion, and credibly denied that the addendum had been received or was considered in that meeting.

While Mr. DePalma, acknowledges that Mr. Stoneking was never terminated, he insists that the resignation was accepted at the August 25th meeting, with thirty days for reevaluation, which he admitted the inclusion of "the possibility of continued employment." The position presented by Respondent that they had actually accepted Mr. Stoneking's resignation on August 25th, is a polemical one, without real effect in this decision and order. I find that he was still on the payroll at the end of the meeting, in what I conclude was a probationary period, and that the actual acceptance of the resignation on August 29, 2001 occurred after he received the hard copy of the addendum on August 27, 2001.

I find that while Mr. Stoneking may have had some reason to believe that the matters discussed in the addendum had also been resolved, insofar as Mr. DePalma's apologies may have appeared to cover all the matters at issue between them, the conduct of DePalma and Driller, as well as their testimony concerning the limited nature of the discussions and credible denial of knowledge of the tone of the addendum, all convince me as a matter of fact that the issues contained in the addendum were neither received by them, nor discussed or resolved at that meeting.

The Content of the Addendum:

As determined above, Mr. Stoneking verified that, in addition to the August 18th letter sent by e-mail to Mr. DePalma, he sent a hard copy of the same letter via certified mail, with the addendum of items listed as reasons for the resignation. Respondent's date stamp on the Joint Exhibit 2 letter with the addendum shows receipt on August 27th. He also confirmed that while he had liked DePalma personally, and told him so in the meeting as previously discussed, he acknowledged that his relationship with DePalma had deteriorated, and that the addendum was an indication of how far the relationship had deteriorated.

Mr. Stoneking confirmed that on or about August 29, 2001, after the receipt of the hard copy of the August 18th letter with the addendum (JX 2), he was informed that AvBase had accepted his resignation, and that he would no longer “need to be” an employee there. He also acknowledged that submitting a letter containing so many negative and bitter comments could have led to his termination, and that there were many negative feelings about the company stated that would upset Mr. DePalma. For instance, commences as follows:

John,

In a confidential letter between the both of us, I want to list out for you the reasons for my resignation:

1. I want to thank you for the reduction in pay from over 120,000 in the fourth quarter last year, to 65,000 in the second quarter this year. This reduction pay came before my assignment as Chief Pilot and a written agreement between you, myself and Jim Clifford, for a minimum monthly take home pay of \$6,500.00 dollars, of which you both agreed upon. There was no differential compensation given for the management position, but the pay was reduced further when I resigned as Chief Pilot.
2. I want to thank you for showing us how management by intimidation works in employee turnover, employee lack of trust in management and the inability of subordinate management to effectively not be able to do their jobs.
3. I want to thank you for having me drive over 10,000 miles, ...
4. I want to thank you for having me drive over 10,000 miles, half the time in the middle of the night, ...
5. I want to thank you for terminating relationships with employees that put out their best for you, in your best interest, kept Federal Agencies and major customers from shutting down the Company and then seeing you belittle those individuals in front of co-workers showing no appreciation whatsoever for their efforts.
6. I want to thank you for appointment as Chief Pilot and at the same time giving me the illusion that things would change for the better ...

7. I want to thank you

This continues for 15 numbered paragraphs⁶ and approximately 25 paragraphs, total. (JX 2, Appendix and Appendix "A", hereto.)

Only two items of the 15 numbered in the addendum, Items 12 and 14, address possible FAA violations. Those state, in relevant part:

12. I want to thank you for putting AvBase above the rules of Federal agencies in asking me to falsify documents, stating that you would "hang it" on select individuals, ask for their resignation and the problem would go away. You not only asked me once, but twice and stated that I was "playing games", had no concern for the AvBase family and was only concerned in being the "good guy" and my own interests. I stand behind the decision that the safety of the passengers, the crews, the standards of AvBase's vendors and work ethics as a professional, will be above any falsifying of any documentation, as required. I have never compromised myself before and I will not start now.

* * *

14. The aircraft has become unreliable, based on statements made by that vendor.

Appendix A.⁷

Mr. DePalma testified that he had never received a letter like the addendum from Mr. Stoneking in thirty years, and that he felt "violated," and "very upset." He testified that they fly "high-profile people" such as U.S. House of Representatives Speaker Dennis Hastert, and that the crews have to be very positive and involved. He stated that flight safety is paramount. With what Mr. Stoneking felt, as expressed in his addendum, he said that, "it wouldn't have been practical for us to go forward, you know, on, on an interim basis." DePalma said that he would have "parked the plane" if he had to, but that the reference to Federal Rules as stated in Item 12 did not play any part in his decision to let the separation to go forward.

⁶The first two pages of the addendum or Appendix to Joint Exhibit 2, (attached as Appendix "A" hereto,) contain numbered paragraphs as Items 1 through 15, with approximately 10 unnumbered paragraphs thereafter, depending on whether certain sentences are considered parts of paragraphs. There is a reference by Mr. DePalma to 25 paragraphs, indicating that the original addendum might have been numbered as such. However, these are not shown on the official copy of the addendum entered into evidence as the Appendix to Joint Exhibit 2 in this proceeding. Since there are no other numbered paragraphs in the addendum, I am using "Item 15" to encompass that paragraph and all paragraphs in the rest of the document.

⁷See footnote 4, *supra*.

The Galaxy Overweight Incident:

As a specific, single item raised by Mr. Stoneking prior to the events that led to his resignation, Stoneking testified that on March 15, 2001 he received information concerning a problem with overweight landings by the Galaxy Aircraft. At the time, the certified landing weight limit was 28,000 lbs., with recorded landings ranging from 29,000 lbs. to 32,000 lbs. FAA regulations require log book entries for such overweight landings to include rates of descent, actual weight at landing, and an inspection of the aircraft exceeding the limits. Mr. Stoneking did not know what had been recorded, since that was a maintenance function, but he knew that the excessive weight landings would eventually be uncovered by the FAA, so he went to FAA Principal Operations Inspector Walt Moore and Inspector Dennis Tom, and asked what they should do. In a meeting with Mr. DePalma and himself, Stoneking discussed the fact that documentation of the overweight conditions was there and what their resolution should be. All of this resulted in a full FAA inspection of AvBase, and a meeting between Messrs. Moore, Tom, DePalma and himself about them. He testified that as a result of the meeting, the only thing that changed was that nobody was to be under (in contact with) the FAA except DePalma or Joe Autumn, the person then assigned to liaison with the FAA. Specifically, the directive was that, "if a question comes up about a regulation, which often happens, or an issue arises that we need some guidance from the FAA, we have one person within our company, and it's not me, that, it's our Director of Operations, that goes to the FAA with the question. ..." (T 97) This, DePalma stated, was not a statement that other people could not go to the FAA.

Mr. DePalma testified that they had a meeting and had done a self disclosure on the overweight disclosure. He said that if anything is ever raised within the company, they bring it to the FAA's attention immediately when the employees bring it to them, and that the issue in March had nothing to do with accepting Mr. Stoneking's resignation. He also maintained that his reaction to the August 18th addendum was in reaction to the total tone of the letter, and had nothing to do with the FAA reference in Item 14, which I credit.

CONCLUSIONS OF LAW

Applicable Law:

As previously stated, this case has been brought under the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21" or "the Act"), 49 U.S.C. § 42121. The employee protection provisions proscribe discrimination by employers against employees as follows:

No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)

(1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or the Federal Government information relating to any violation or any alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;

(2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or any alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;

(3) testified or is about to testify in any such a proceeding; or

(4) assisted or participated or is about to participate in such a proceeding.

49 U.S.C. § 42121(a).

The decisional law developed under the whistleblower protection provisions of the Energy Reorganization Act of 1974 (“ERA”), as amended in 1992, the Whistleblower Protection Act (“WPA”), and environmental statutes provide the framework for litigation under AIR21. *See* Procedures for the Handling of Discrimination Complaints under Section 519 of the Wendell H. Ford Aviation and Investment Reform Act for the 21st Century; Final Rule, 67 Fed. Reg. 15,453-15,461 (April 1, 2002)(to be codified at 29 C.F.R. Part 1979). Accordingly, the jurisprudence developed under existing whistleblower statutes will be applied to the instant case.

The AIR21 whistleblower provisions contain the same statutory burden of proof standards that are included in the ERA whistleblower provisions. In 1992, Congress amended the employee protection provision of the ERA, 42 U.S.C. § 5851, “to included a burden-shifting framework distinct from Title VII employment-discrimination burden-shifting framework first established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-05 (1973).” *See Trimmer v. United States Department of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999). Initially, the complainant is required to establish a *prima facie* case, which raises an inference that the protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint, during the investigative process after filing a complaint under the ERA and AIR21.

49 U.S.C. § 42121(b)(2)(B)(i). Even if the employee establishes a *prima facie* case, the Secretary cannot investigate the complaint if the employer can prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of employee's protected behavior. § 4121(b)(2)(B)(ii). Thus, the Secretary can only investigate a complaint if the employee establishes a *prima facie* case and the employer fails to disprove the allegation of discrimination by clear and convincing evidence.

The instant case has been tried fully on its merits. There remains no analytical purpose to address and resolve the question of whether the complainant presented a *prima facie* case. Rather, the relevant inquiry is whether the complainant prevailed by a preponderance of the evidence on the ultimate question of liability. *See Carroll v. Bechtel Power Corp.*, 1991-ERA-46 slip op. at 9-11 (Sec'y Feb. 15, 1995), *aff'd Carroll v. U.S. Dept. of Labor*, 78 F.3d 352, (8th Cir. 1996); 42 U.S.C. § 42121(b)(2)(B)(iii); *see also Paynes v. Gulf States Utilities Co.*, ARB No. 98-045, ALJ No. 1993-ERA-47 (ARB Aug. 31, 1999); *Trimmer*, 174 F.3d at 1101-1102; *Dysert v. Secretary of Labor*, 105 F.3d 607, 609-610 (11th Cir. 1997)(holding that the complainant's burden is a by a preponderance of the evidence). The determination in this matter rests on whether Complainant has proven, by a preponderance of the evidence, that he engaged in protected activity under the Act, that AvBase took adverse action against him, and that Complainant's protected activity was a contributing factor in the adverse action that was taken. *See* 42 U.S.C. § 5851(b)(3)(C); *Simon v. Simmons Foods*, 49 F.3d 386 (8th Cir. 1995); *Ross v. Florida Power & Light*, Case No. 96-ERA-36, ARB Case No. 98-044, Fin. Dec. & Order, Mar. 31, 1999, slip op. at 6.

The Court of Appeals for the Federal Circuit, interpreting WPA § 1221(e)(1), observed that:

The words "contributing factor" . . . mean any factor, which, alone or in connection with other factors, tends to affect in any way the outcome of a decision. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected activity was a "significant", "motivating", "substantial", or "predominant" factor in a personnel action in order to overturn that action.

Marano v. Department of Justice, 2 F.3d 1137, 1140 (Fed. Cir. 1993)(citations omitted).

The burden only shifts to the employer to demonstrate, by clear and convincing evidence, that it would have taken the same unfavorable personnel decision in the absence of employee's protected behavior if complainant meets his initial burden. *See Trimmer*, 174 F.3d at 1102. "Clear and convincing" is recognized by the courts as an evidentiary standard that is higher than preponderance of the evidence but less than beyond a reasonable doubt. *See Yule v. Burns Int'l Security Service*, Case No. 1993-ERA-12 (Sec'y May 24, 1995). If the employer meets its burden of producing a legitimate, nondiscriminatory reason for its employment decision, the complainant then inherits the burden of proving by a preponderance of the evidence that the

employer's proffered reasons constitute a pretext for discrimination. *See Overall v. Tennessee Valley Authority*, Case No. 1997-ERA-53 at 13 (ARB Apr. 30, 2001).

A. Protected Activity

Protected activity, under the environmental acts, is broadly defined as a report of an act which the complainant reasonably believes is a violation of the environmental acts, as long as the complaint is grounded in conditions constituting reasonably perceived violations. *See Minard v. Nerco Delamar Co.*, 92-SWD-1 (Sec'y Jan. 25, 1995) slip op. at 1. It is an objective assessment; subjective belief of the complaint is not sufficient. *See Kesterson v. Y-12 Nuclear Weapons Plant*, 95-CAA-12 (ARB Apr. 8, 1997). In the *Minard* case, the Secretary indicated the complainant must have reasonable belief that the substance is hazardous and regulated under an environmental law. Consequently, the complainant's concern must at least "touch on" the environment. *Nathaniel v. Westinghouse Hanford Co.*, 91-SWD-2 (Sec'y Feb. 1, 1995), slip op. at 8-9; and, *Dodd v. Polystar Latex*, 88-SWD-4 (Sec'y Sept. 22, 1994). If a complainant had a reasonable belief that the respondent was in violation of an act, the fact that he or she may have other motives for engaging in protected activity is irrelevant. *See Carter v. Electrical District No. 2 of Pinal County*, 92-TSC-11 (Sec'y July 26, 1995).

The Secretary of Labor has consistently held that an employee who makes internal safety complaints is protected under the whistleblower provisions of the applicable environmental statutes. *See Goldstein v. Ebasco Contractors Inc.*, Case No. 86-ERA-36 (Sec'y Dec. & Order April 7, 1992) *rev'd sub. nom.*, *Ebasco Contractors, Inc. v. Martin*, No. 92-4576 (5th Cir. Feb. 16, 1993) (per curiam); *Willy v. The Coastal Corporation*, Case No. 85-CAA-1 (Sec'y Dec. & Order June 4, 1987); *Mackowiak v. University Nuclear Systems, Inc.*, Case No. 82-ERA-8 (Sec'y Dec. & Order April 29, 1983). In addition, an informal complaint, such as a verbal communication, constitutes "protected activity." *See Nichols v. Bechtel Construction, Inc.*, 87-ERA-44 (Sec'y Oct. 26, 1992) (employee's verbal questioning of foreman about safety procedures constituted protected activity), *aff'd in Bechtel Construction, Inc. v. Secretary of Labor*, 50 F.3d 926, 931 (11th Cir. 1995) (stating that general inquiries regarding safety do not constitute protected activity, but a pattern of inquiries regarding how to handle contaminated material can add up to protected activities). The regulations make it clear that a formal proceeding is not required in order to invoke protection of the Act. *Kansas Gas & Electric Company v. Brock*, 780 F.2d 1505, 1512 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986).

To constitute protected activity, an employee's acts must implicate safety definitively and specifically. *American Nuclear Resources v. U.S. Department of Labor*, 134 F.3d 1292 (6th Cir. 1998). The whistleblower statutes do not protect every incidental or superficial suggestion that somehow, in some way, may possibly implicate a safety concern. *Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568, 1574 (11th Cir. 1997). Raising particular, repeated concerns about safety issues that rise to the level of a complaint constitutes protected activity. *Bechtel Construction Co. v. Secretary of Labor*, 50 F.3d 926, 931 (11th Cir. 1995). Making general inquiries regarding safety issues, however, does not automatically qualify as protected activity.

Id. Where the complainant's complaint to management concerns subjects regulated by the pertinent statutes, the complaint constitutes protected activity. *See Nathaniel*, 91-SWD-2 at slip op. 8-9.

Thus, protected activity under AIR21 has two elements: (1) the complaint must involve a purported violation of an FAA regulation, standard, or order relating to air carrier safety; and (2) the complainant's belief about the purported violation must be objectively reasonable. *See Parshley v. America West Airlines*, 2002-AIR-10 (ALJ Aug. 5, 2002), slip op. at 59.

In March of 2001, Mr. Stoneking brought his concerns about the Galaxy being overweight on landings to the attention of the FAA and AvBase. The record establishes that his safety concerns were objectively reasonable. I find that Mr. Stoneking's voicing of concerns to the FAA, which occurred five months before his resignation was accepted, constitutes protected activity under the AIR21 Act.

Mr. Stoneking also alleges that he engaged in protected activity when he submitted the addendum to AvBase. There were 15 numbered references to numerous employer/employee matters addressed by Mr. Stoneking in the addendum, primarily dealing with pay for being Chief Pilot and reasons for resigning that position; travel treatment of scheduled pilots and interference with family matters that resulted from AvBase schedules. A complainant may be found to have engaged in protected activity even if their primary motive for voicing complaints is not safety considerations. However, it is important to evaluate the complainant's conduct in the proper context. Mr. Stoneking, in item 15, provided the context for his addendum when he stated:

The most important reason for the submission of this letter, though, is the lack of concern that is shown, at times, for the families that have depended on you and AvBase. It is amazing that AvBase assumes that one's family is expendable for the sake of making things happen for AvBase. I understand that you have a business to run, but if the forethought would have gone into the equation that people and families are your greatest asset, you probably would not find yourself in this predicament. I have seen and heard the constant changes that are made to accommodate the Company, with little or no regard to family or personal lifestyles. I know that you have given in the interest of some families, but I am not sure it was done in the right direction, with all of the other chaos that was going on.

(Tr.).

Items 12 and 14 appear to deal with potential FAA air carrier safety matters. However, standing alone, the two references only amount to superficial implications of safety concerns. Mr. Stoneking did not present evidence that he raised particular, repeated concerns. Items 12 and 14 do not rise to the level of protected activity under the AIR21 Act.

B. Adverse Employment Action

Complainant must next demonstrate, by a preponderance of the evidence, that the action had some adverse impact on his employment. *See Trimmer*, 174 F.3d at 1103, citing, *Montandon v. Farmland Indus, Inc.*, 116 F.3d 355, 359 (8th Cir. 1997); *but see DeFord v. Secretary of Labor*, 700 F.2d 281, 287 (6th Cir. 1983)(economic loss is not required for action to be adverse). The governing regulations define discrimination or adverse employment action very broadly. *See* 29 U.S.C. 24.2(b) (“Any employer is deemed to have violated the particular federal law and the regulations in this part if such employer intimidates, threatens, restrains, coerces, blacklists, discharges, or in any other manner discriminates against any employee because the employee has [engaged in protected activity]”). “Adverse action is simply something unpleasant, detrimental, even unfortunate, but not necessarily (and not usually) discriminatory.” *Stone & Webster Engineering Corp.*, 115 F.3d 1573.

As noted at the hearing, I now conclude that there is not substantial evidence in the record, through the date of the August 25th meeting, that the addendum to the resignation letter was actually transmitted, or received, or read by Respondent via e-mail; as evidenced by either direct evidence or by discussion at the meeting as verified by both parties. As an explanation, Mr. Stoneking stated his belief as to why he did not discuss it, and I credit him to this effect, that both DePalma and he, had apologized to each other and wanted the working relationship to go forward. He said that Mr. Driller, being brand new to the company, and with Mr. DePalma’s approval, felt that it would be in the best interest of the company, to have Driller take over certain matters, and that he would report directly to him and review the matter of Stoneking’s continued employment in thirty days. So be it. The fact is that there is not substantial evidence of adverse action attributable to Mr. DePalma or AvBase against Mr. Stoneking for any reason prior to that August 25th meeting, until the receipt of the addendum. For reasons stated above, I do not consider AvBase’s conduct regarding the post-Galaxie overweight incident, in the consolidation of FAA contact functions in one person other than Mr. Stoneking, to have constituted substantial evidence of adverse action against Mr. Stoneking.

With regard to the acceptance of Mr. Stoneking’s resignation, as a first consideration, Complainant has failed to establish that the acceptance of the resignation constituted a constructive discharge. In the United States Court of Appeals for the Sixth Circuit, in which this matter arises, the criteria for such an allegation is set forth in *Held v. Gulf Oil Co.*, 684 F.2d 427, 432 (6th Cir. 1982), as characterized by that court in *Moore v. Kuka Welding Systems*, 6th Cir. App. No. 97-1734, p.5 (March 26, 1999), is that a constructive discharge may be established where the employer has created, “intolerable working conditions, as perceived by a reasonable person, with the intent of forcing the employee to quit....” In addition, the employee must “actually quit.” That criteria must also examine “both the employer’s intent and the employee’s objective feelings....” and recognize that proof of a “hostile work environment is not enough ... to prove constructive discharge” This is to distinguish a forced discharge from a voluntary one. As a second consideration, absent a determination that a resignation or quit rises to the level of a constructive discharge under the above cited cases, the belated acceptance of a resignation cannot

render an outstanding voluntary resignation, which was never withdrawn, involuntary. It was, and remained, voluntary, and not subject to the constructive discharge criteria.

There is no question that Mr. Stoneking initially quit by tendering his resignation, but the tender was one of his own volition, and not the result of the creation of “intolerable working conditions, as perceived by a reasonable person, with the intent of forcing the employee to quit....” The fact that a meeting was held; that the day of actual resignation was extended for thirty days accompanied by conditions which I have determined to be probationary terms possibly warranting reconsideration of his continuing at AvBase; that AvBase thereafter learned of Mr. Stoneking’s harsh addendum to the initial resignation letter; and that it decided to accept the resignation before expiration of the thirty day probationary period based upon that addendum, does not convert the matter into a constructive discharge, as the Complainant has so conceded that in his post-hearing brief.

I have determined that Mr. Stoneking and AvBase reached an agreement during the August 25, 2001 meeting that could be construed to have provided Mr. Stoneking with at least 30 days of continued employment. However, it was clearly a “probationary period” during which he was definitely an at-will employee. Nevertheless, AvBase’s acceptance of Mr. Stoneking’s resignation on August 29, 2001, 26 days before the quasi-probationary period was to end, was unfortunate and detrimental to Mr. Stoneking. The premature acceptance of Mr. Stoneking’s resignation constitutes adverse action.

C. Protected Activity as a Contributing Factor in Adverse Employment Action

Mr. Stoneking has established that he engaged in protected activity in March of 2001 and that his resignation was accepted prematurely. He must now establish that his protected activity was a contributing factor to the adverse action. To establish the connection between protected activity and adverse employment action, the complainant need not have any specific knowledge that the respondent had an intent to discriminate against the complainant. Rather, ERA employee protection cases may be based on circumstantial evidence of discriminatory intent. *See Frady v. Tennessee Valley Authority*, 92-ERA-19 and 34 (Sec’y Oct. 23, 1995) slip op. at 10n; *Mackowiak*, 735 F.2d at 1162, quoting, *Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980).

The Administrative Review Board reviewed principles governing the evaluation of evidence of retaliatory intent in ERA whistleblower cases in *Timmons v. Mattingly Testing Services*, 95-ERA-40 (ARB June 21, 1996). The Board indicated that where a complainant’s allegations of retaliatory intent are founded on circumstantial evidence, the fact finder must carefully evaluate all evidence pertaining to the mind set of the employer and its agents regarding the protected activity and the adverse action taken. The Board also noted that there will seldom be “eyewitness” testimony concerning an employer’s mental process. Therefore, fair

adjudication of whistleblower complaints requires “full presentation of a broad range of evidence that may prove, or disprove, retaliatory animus and its contributions to the adverse action taken.” *Id.* at 5.

The Galaxy overweight incident, which constituted protected activity, was resolved five months before AvBase accepted Mr. Stoneking’s resignation. This incident was not raised thereafter, and is not continuing protected activity which could serve as a “whistleblower” foundation prior to the submission of the resignation addendum. Mr. Stoneking presented no evidence that any adverse or unpleasant had ever occurred to him due to his report to the FAA about the Galaxy. Mr. Stoneking does not make any direct reference to the Galaxy overweight matter in the addendum to the August 18th letter. Item 14, (“The aircraft has become unreliable, based on statements made by that vendor.”), is the closest to it, but is so general, and with such a gap in time - from March to August, 2001 - that it cannot even raise a circumstantial inference that the Galaxy overweight issue led to AvBase adversely accepting his resignation before the expiration of the quasi-probationary period. There is no evidence that any action was initiated in the interim between March and August against Mr. Stoneking because he discussed the overweight problem with the FAA. He does claim that Respondent proceeded to limit those who could be in contact with the FAA about various matters, but presented insufficient evidence to conclude that the limits were other than limits on who was to represent the AvBase before the FAA, or that he was precluded from going before the FAA. Therefore, I find that the Galaxy overweight issue cannot serve as the protected activity motivating the acceptance of Mr. Stoneking’s resignation, or for his termination within the purview of the AIR21 Act, and that it did not “contribute to” that acceptance or termination.

Mr. Stoneking’s addendum contains allegations of falsification of documents that could be hung on certain individuals to induce their resignations, which does not rise to the level of protected activity. Notwithstanding that finding, I further find that there is insufficient evidence to establish that the acceptance of Mr. Stoneking’s resignation was motivated by those allegations. The record does not show that the referenced incidents had been raised as matters of air carrier safety to AvBase or the FAA before the submission of the resignation addendum, nor does the record show that the facts surrounding those allegations had been considered at all as a basis for trying to induce Mr. Stoneking’s resignation or terminating his position. The purpose of the addendum was to address other matters at issue between Mr. Stoneking and Mr. DePalma

The general language of the addendum typifies the nature of the complaints raised by Mr. Stoneking in the addendum. While they might have constituted legitimate complaints under other statutory provisions,⁸ none of them were discussed by Mr. Stoneking with the FAA, and none

⁸They appear to be matters of rates of pay, rules or working conditions of employment by air carriers, appropriately addressed, under the provisions of other statutes, such as the Railway Labor Act, 46 U.S.C. Section 151, *et seq.* and, specifically 45 U.S.C. Sections 181 - 188, which encompass such disputes involving carriers by air in the air transportation industry. While the disputes that Mr. Stoneking had with AvBase management may have concerned these matters there is no other evidence of such activity either individually or collectively on behalf of labor organizations at AvBase.

were appropriately raised in conjunction with his resignation as matters of air carrier safety. Mr. Stoneking confirmed that it was not until October 2001, that he actually wrote a letter to the FAA detailing what he perceived to be problems with the way AvBase conducted its business.

Mr. Stoneking has not established, by a preponderance of the evidence, that he suffered adverse action as a result of engaging in activity protected under the AIR21 Act.

D. Respondent's Burden

Assuming, *arguendo*, that Mr. Stoneking had demonstrated that his protected activity contributed to AvBase's adverse employment action, AvBase then has the burden to produce evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. 49 U.S.C. § 42121(b)(2)(B)(iv). Relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior. 29 C.F.R. § 1979.109(a).

I credit Mr. Depalma's statement that he would have parked the plane had such a serious carrier safety issue been raised by Mr. Stoneking based on his demeanor and consistency and the fact that no previous attempt had been established to demonstrate interference with Mr. Stoneking's enforcement of FAA or safety rules and regulations. There is no other supporting evidence that he would not. I acknowledged to the parties at the hearing, and now confirm, that the addendum appeared to be, and is found to be, a very sarcastic and very negative letter, the tone is insubordinate and deals with numerous disputes between Stoneking and AvBase, far beyond the subject of air carrier safety that could have warranted his discharge, and that it stands for itself, for the matters evident in Appendix "A". Mr. Stoneking admitted that at the hearing.

I have determined that, rather than any prior protected activity, it was the general tone of the addendum that caused Respondent to reconsider whether it wanted Mr. Stoneking to remain in its employ, and to accept his pending written resignation, rather than any of the non-specific references to Federal Agencies or airworthy aircraft that were included in the addendum. I find that the early acceptance of Mr. Stoneking's resignation on August 29, 2001 was motivated by the first knowledge of the addendum by Mr. DePalma.

CONCLUSION

For the reasons stated herein, I find that Complainant has not established, by a preponderance of the evidence, that the protected activity that he engaged in under the AIR21 Act led to adverse action against him in the form of Respondent's early acceptance of his resignation on August 29, 2001. Accordingly, the complaint must be dismissed.

Therefore,

IT IS ORDERED that the complaint of Complainant, James L. Stoneking, alleging violations of the provisions of 49 U.S.C. Section 42121(a) of the AIR21 Act, is dismissed.

A

THOMAS F. PHALEN, JR.
Administrative Law Judge

NOTICE:

This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110 (2002), unless a petition for review is timely filed with the Administrative Review Board (“Board”), United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Any party desiring to seek review, including judicial review, of a decision of the administrative law judge must file a written petition for review with the Board, which has been delegated the authority to act for the Secretary and issue final decisions under 29 C.F.R. Part 1979. To be effective, a petition must be received by the Board within 15 days of the date of the decision of the administrative law judge. The petition must be served on all parties and on the Chief Administrative Law Judge. If a timely petition for review is filed, the decision of the administrative law judge shall be inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board. The Board will specify the terms under which any briefs are to be filed. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, D.C. 20210. See 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).

APPENDIX A

August 18, 2001

John DePalma
AvBase Aviation
6200 Riverside Drive
Cleveland, OH 44135

Re: resignation

John,

In a confidential letter between the both of us, I want to list out for you the reasons for my resignation:

1. I want to thank you for the reduction in pay from over 120,000 in the fourth quarter last year, to 65,000 in the second quarter this year. This reduction pay came before my assignment as Chief Pilot and a written agreement between you, myself and Jim Clifford, for a minimum monthly take home pay of 6500.00 dollars, of which you both agreed upon. There was no differential compensation given for the management position, but the pay was reduced **further** when I resigned as Chief Pilot.
2. I want to thank you for showing us how management by intimidation works in employee turnover, employee lack of trust in management and the inability of subordinate management to effectively not be able to do their jobs.
3. I want to thank you for having me drive over 10,000 miles, half the time in the middle of the night, to make sure that operations kept on running effectively and in the end of our relationship, ultimately accounted for nothing.
4. I want to thank you for terminating relationships with employees that put out their best for you, in your best interest, kept Federal Agencies and major customers from shutting down the Company and then seeing you belittle those individuals in front of co-workers showing no appreciation whatsoever for their efforts.
5. I want to thank you for appointment as Chief Pilot and at the same time giving me the illusion that things would change for the better and then taking away all duties and responsibilities of the position, as outlined in the Company Manuals, so as to control that position by your direct authority only.

6. I want to thank you for treating office personnel as though they were a minor class citizen, belittling them in front of co-workers and ignoring the endless hours and constant change that you implement, without notice, making their efforts a thankless position.
7. I want to thank you for having the turnover that AvBase has had, along with the extreme substantial amount of unaccountable training costs. Ultimately the blame was placed on those individuals that have left the Company instead of taking a look at who made the decisions that effected the turnover/costs, in the first place.
8. I want to thank you for never addressing, as promised, crew schedules, benefits, pay reductions and making crew flight assignments on days scheduled off without their consent. I vividly recall your statement last fall that stated, "the crews that fly on the dedicated aircraft WILL NOT be flown on their days OFF, since they are overnight seven days in a row." That statement was revised in April to say, "the crewmembers will be available to fly on their days off. If they do not like that, they never should have gotten into aviation." How would you think the thought process would be of the crewmembers when it comes to turnover and Company loyalty? What was I supposed to tell them in response to an issue as such?
9. I want to thank you for making the promises to keep me with AvBase as long as you did, such as larger aircraft, expansion, legal assistance that was promised for over a year and the initial pay that was part of the enticement to stay with you.
10. I want to thank you for showing me how quickly one can turn their support for an employee, in spite of the efforts and time that they have put in their job, the revenue that they have generated for the Company, and then see the ruin of their career and position with AvBase, with no regard what so ever for them or their family, regardless their past performance.
11. I want to thank you for rmonitoring all of the transmissions that employees have made on Company pagers and then use that monitoring to belittle selected individuals as having "dual lives" and that it was inappropriate for them to carry on as such and at the same time you have your "private stock" on the side. Ultimately, you stated that you did not want to be "big brother" in your actions in monitoring the transmissions, but as of this date, transmissions are still monitored as to their content and intentions and brought to the attention of the individual(s) if they do not meet management's criteria for usage.
12. I want to thank you for putting AvBase above the rules of Federal agencies in asking me to falsify documents, stating that you would "hang it" on select individuals, ask for their resignation and the problem would go away. You not only asked me once, but twice and stated that I was "playing games", had no

concern for the AvBase family and was only concerned in being the “good guy” and my own interests. I stand behind the decision that the safety of the passengers, the crews, the standards of AvBase’s vendors and work ethics as a professional, will be above any falsifying of any documentation, as required. I have never compromised myself before and. I will not start now.

13. I want to thank you for telling co-workers that my personal injury on the job was to secure vacation time with the family, not claim it on worker’s compensation and that I needed to work light duty in the office to appease the situation. I am not sure what vacation you were talking about, though. I did, however, prematurely, against medical order’s, return to work to assist in keeping the schedule operating as necessary. As of this date, the injury has not healed.
14. I want to thank you for showing us how to make AvBase’s interests more important than our largest Vendor’s interest. The statements that they will never “catch” AvBase doing what we need to do, because they are not smart enough, jeopardizes each and every employee at AvBase. Without the revenue of that Vendor, the AvBase story ends. I am not sure what the thought process is, but it is self-evident in the utilization of our largest aircraft over the past 5 months in comparison to the other dedicated aircraft. The aircraft has become unreliable, based on statements made by that vendor.
15. I want to thank you for showing the employee staff that one can be terminated due to lack of pilot skills, lack of necessary professional and customer skills, have legal action directed at their actions of threat against the Company, both verbal and physical and when it becomes necessary to “move” aircraft, re-hire them for duty. One can only begin to imagine the thought process of the employees and the value of their efforts in sustaining the Company. Your employees are so confused and frustrated with this decision. Rightfully, I cannot blame them. When asked about it, I honestly did not have an answer.

The most important reason for the submission of this letter, though, is the lack of concern that is shown, at times, for the families that have depended on you and AvBase. It is amazing that AvBase assumes that one’s family is expendable for the sake of making things happen for AvBase. I understand that you have a business to run, but if the forethought would have gone into the equation that people and families are your greatest asset, you probably would not find yourself in this predicament. I have seen and heard the constant changes that are made to accommodate the Company, with little or no regard to family or personal lifestyles. I know that you have given in the interest of some families, but I am not sure it was done in the right direction, with all of the other chaos that was going on.

With the events that unfolded this past week, it was evident, that it was fully expected that AvBase be a higher priority than my own family I made the request to you six months ago, to spend time with my family this summer, for a period equal to ten days off. This would be our last summer together as a family. You agreed to the facts requested, but pushed back the request through May, June and then July. Finally, you agreed that I could take some time off. The scheduled time off, though, was to be on my days off anyway. In doing so, there would not be any conflict with any scheduling, since we are so understaffed.

There was a page sent to my attention, addressing this issue, and went as follows: "here's the deal, off Saturday through the following Sunday, while the plane is in Hawaii and you will need to be in position for a Monday morning flight with our Vendor. With the potential for scheduling change, as usual, I elected a closer destination for the travel. Since there was never sufficient time given to plan accordingly, we had to drive. I was then advised that the schedule did change and that it would have to be adhered to, regardless of where I was or what I was doing. I resent that fact that there was no accommodation made for the time that was requested in this matter. I find it interesting that the schedule was very easily covered during the time that I was injured on the job, but not during this time period that you agreed to since the first of the year.

In spite of all the facts contained in this letter, none is more upsetting than the assumption made by the Company, that it was fully expected of my family to drive themselves back home, on their own, over 600 miles, in one of the most crime ridden areas of the County.

Shame on you staffing your fleet appropriately and once again, not following through with an agreement that you made. My family and I have sacrificed enough for you and AvBase over the past 13 months. This was more than one can tolerate and my family take a second priority to the Company anymore.

I find it amazing that repositioning to home base to accommodate one's interests and family time is acceptable, but not acceptable for one to expect the same treatment with their interests or family.

I have never been able to tell you how to run your business nor has anyone else for that matter. This would explain the current condition of the Company and the turmoil that exists from within the rank and file. As of late you have made the statement that anyone looking for a job would be terminated, while you have "blocked" other employment for those individuals that have sought employment elsewhere. I am really confused as to what you are trying to accomplish. Do you blame those individuals for leaving.

I stayed on with you, as long as I did, in the spirit of considering you a friend. Although we enjoyed each other's families and company through this period, we always stated that we wanted to build something special together.

With the deterioration of what relationship we might have had over the past year, it is evident that the relationship has come to a close. One can only endure so much personally and seeing what other employees have gone through. Unfortunately, it becomes very apparent that the stability and future with AvBase, would be minimal, at best.

My suggestion, as a friend, is that there is a difference between being a manager and a leader. That is probably the biggest difference in our management style and technique. One needs to self-evaluate, once in a while and determine if they would work in their employ. It becomes an eye opener, looking at things in a different perspective.

I sincerely hope that the optimism of the current management staff is viewed as an essential part in the development of AvBase and that it comes at a time that is so crucial in the condition and future of the Company.

I wish you the best, as I am sure you wish my family the same.

Respectfully,

Jim Stoneking

jms